Indeed, the Fifth Circuit's opinion in this case flatly eliminates the requirement established by this Court and by other Courts of Appeals that the trial judge has an independent, mandatory duty to advise jurors of the ultimate facts which must be proved in a federal criminal case before a conviction may be countenanced.

It is true that the trial judge read to the jury the statutes creating the offenses for which this Petitioner was indicted (R. 247-248; 248-250; 250-251).

But in one statute (Section 1708, Title 18), at least 493,841 acts are made criminal offenses; the other statute (Section 495, Title 18) creates 600 independent crimes. (A catalog of these offenses was filed with the Fifth Circuit in a "Reply Brief for the Appellant." A certified copy of this Reply Brief has been filed in this Court with the certified record.)

It seems almost elementary to observe, as did the Ninth Circuit, that:

> "The verdict is not merely a report upon the facts; it is a legal decision that the facts laid before (the jury) do or do not fit the essential elements of a social proscription, the violation of which entails a penalty." *Morris v. U.S.*, 156 F.2d 525, 531.

The judge in this case, we contend, completely failed to advise the jury what factual decisions it was required to make—to an extent which constitutes plain error under Criminal Rule 52(b).

The Fifth Circuit itself has recognized that instructions almost exactly like those given here are completely inadequate, stating:

> "An examination of the charge as to Count 1 of the indictment shows that it constitutes chiefly a reading by the court to the jury of all of Section 301 and of Count 1. Not a word is said as to exactly what is charged in the count, nor of what proof is necessary under it. We think this amounts to there having been virtually no charge, and, therefore, there is reversible error. *Campbell v. U.S.*, 167 F.2d 451, 453."

A defendant has, of course, a "fundamental right" to "be convicted of crime only on proof of all the elements of the crime charged against him." (*Christoffel v. United States*, 338 U.S. 84, 90), and the Supreme Court has said:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the appropriate legal criteria." (*Bollenbach v. United States*, 326 U.S. 607, 613.)

If anything, the instructions in this case are calculated to confuse, rather than enlighten, the jury. Criticizing the practice of reading an entire statute creating offenses which are not even suggested by the indictment, the Fifth Circuit has said that " the jury should not be permitted to speculate on what crime is being submitted to them to resolve or what the contents of each such crime might be." (*Williamson v. United States*, 332 F.2d 123, 133-134 [1964].)

We do not contend that objections to the charge specifically pointed out these defects.

It has long been established, however, that, "In a criminal case the court must instruct on all essentials of law involved, whether or not it is requested to do so."

See *Samuel v. United States*, 169 F.2d 787, 792 (C.A.9), citing cases from the 2nd, 3rd, 9th, 10th, and District of Columbia Circuits. See also the Fifth Circuit's opinions in *Lott v. United States*, 218 F.2d 675, 680-681 (footnote 7), *Merrill v. United States*, 338 F.2d 763, 767, and *Peterson v. United States*, 344 F.2d 419, 428.

The Supreme Court has repeatedly emphasized that failure to except to a charge which does not correctly set forth the essential law of the case does not defeat an appeal. See *United Brotherhood v. United States*, 330 U.S. 395, 411-412; *Terminiello v. Chicago*, 337 U.S. 1, 5; and Rule 52 (b), Federal Rules of Criminal Procedure.

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." *Screws v. United States*, 325 U.S. 91, 107.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

WILLIAM F. WALSH
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Houston, Texas 77006
JAckson 9-3134
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that five (5) copies of this petition were mailed to the Solicitor General, Department of Justice, Washington, D.C., airmail postage prepaid, and that a copy was mailed to the United States Attorney, Southern District of Texas, Houston, Texas, first class postage prepaid, this ____ day of April, 1966.

WILLIAM F. WALSH

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22,781

JOHN ALBERT COOK, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 18, 1966.)

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

PER CURIAM: This is an appeal from the conviction of appellant on all counts of a three count indictment as follows:

(a) unlawful possession of a stolen United States Treasurer's check in violation of 18 U.S.C. 1708 (Count One),

(b) forgery of a United States Treasurer's check in violation of 18 U.S.C. 495 (Count Two), and

(c) uttering a forged United States Treasurer's check in violation of 18 U.S.C. 495 (Count Three).

It is the contention of appellant that the Court committed reversible error in failing to charge on the elements of the offenses alleged in the counts of the indictment.

In the charge the trial court followed the reading of each count of the indictment by reading in full the statute pertaining to each offense, which statutes contained the elements of the offense charged.

While it is conceded that the charge might be more understandable if the Judge enumerates each of the elements of the offense that must be proven beyond a reasonable doubt, no fundamental error under Rule 52(b) F.R.Crim. P.[1] was committed in the trial court's failure to do so in this instance.

AFFIRMED.

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[1](b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 22,781

D. C. Docket No. 65-H-71-Criminal Action

JOHN ALBERT COOK, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 18, 1966

Issued as Mandate:

APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE FIFTH CIRCUIT

No. 22,781

JAMES ALBERT COOK, Appellant,
versus
UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(MARCH 30, 1966)
ON PETITION FOR REHEARING

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.